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Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5609

DATE COMPLAINT FILED: November 9, 2004

DATE OF NOTIFICATION: November 17, 2004

DATE ACTIVATED: May 10, 2005

EXPIRATION OF SOL: January 7, 2009

COMPLAINANT:

Barbara Lubin, Executive Director of
Clean Elections Institute, Inc.

RESPONDENTS:

Club for Growth, Inc.
Committee to Re-Elect Trent Franks for Congress
and Lisa Teschler, in her official capacity as
Treasurer
Trent Franks
Bluepoint Consulting

RELEVANT STATUTES:

2 U.S.C. § 441a(a)(7)(B)(i)
11 C.F.R. § 109.20
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure reports; Commission indices

FEDERAL AGENCIES CHECKED:

Internal Revenue Service political organization
database

I. INTRODUCTION

The Complaint alleges that Club for Growth, Inc. ("CFG") made illegal in-kind coordinated contributions through a common vendor to Trent Franks, the U.S. Representative for the 2nd Congressional District in Arizona and his principal campaign committee, Committee to

1 Re-Elect Trent Franks for Congress ("the Committee") in 2004.¹ The complaint's general, non-
2 specific allegations of coordination are sufficiently rebutted by the responses and other available
3 information. Accordingly, we recommend that the Commission find no reason to believe that
4 CFG, Trent Franks, the Committee and Bluepoint Consulting, the common vendor, violated the
5 Act or Commission regulations by coordinating expenditures as alleged in the complaint.

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Summary of Complaint and Responses**

8
9 Complainant's sole basis for its allegation that CFG coordinated expenditures with Trent
10 Frank and the Committee is that both CFG, an incorporated 527 organization, and the Committee
11 made disbursements in the 2004 election cycle to Christopher Baker and his company, Bluepoint
12 Consulting ("Bluepoint"), a political consulting business in Scottsdale, Arizona. The complaint
13 includes copies of CFG's 2004 January-August Section 527 Organization disclosure reports filed
14 with the IRS that reflect \$74,510 in disbursements to Baker and Bluepoint for a consulting
15 retainer and for expenses and mail services. It does not quantify the disbursements made to
16 Baker and Bluepoint by the Franks Committee, but the Committee's FEC reports show that the
17 Committee made \$25,500 in disbursements to Bluepoint between February 2003 and August
18 2003 for consulting. The complaint does not address what type of expenditures or activities may
19 have been coordinated, speculating only that the fees paid by both entities to Baker and
20 Bluepoint indicate a "high likelihood" that coordination occurred. Complaint at 1.

¹ Complainant also alleges that CFG made coordinated expenditures to a number of Arizona state legislative candidates through the same vendor and filed complaints with the appropriate Arizona state agencies concerning those allegations. On April 28, 2005, the Arizona Citizen's Clean Elections Commission, the state agency responsible for civilly enforcing Arizona's state campaign finance law, found no reason to believe that a violation of state law had occurred based on the recommendation of an external investigator it hired to investigate the coordination allegations. See Minutes of Public Meeting of the State of Arizona, April 28, 2005, available at <http://www.ccec.state.az.us/cccecweb/cccecays/agmn/mn050428.pdf>.

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CFG and Bluepoint filed responses that challenge the sufficiency of the complaint for failing to set forth any facts as to what communications or other type of expenditures were allegedly coordinated. Nonetheless, as part of their responses, CFG and Bluepoint submitted affidavits, signed by their respective principals, CFG Executive Director David Keating and Bluepoint principal Christopher Baker, that provide facts sufficient to rebut that CFG financed any communications or other activities in the 2004 election cycle that referred to, or related to Trent Franks or the Committee.

The Committee and Trent Franks filed a response that confirms that Chris Baker of Bluepoint provided campaign consulting services to the Committee in the "2002-2004" election cycle. The Committee's response does not provide any facts relevant to rebutting allegations of coordination. Instead it merely characterizes any claims of coordination between Franks and the Committee and CFG or any other 527 organization as "baseless" and "completely false."

Committee Response.

B. Analysis

1. Coordination Law

Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate constitutes an in-kind contribution. *See* 2 U.S.C. § 441a(a)(7)(B)(i). *See also* 11 C.F.R. § 109.20(a). Commission regulations set forth a three-prong test to define when a communication is coordinated with a candidate. A communication is coordinated with a candidate or candidate committee when:

(1) the communication is paid for by a person other than that candidate, authorized committee or agent thereof; (2) the communication satisfies at least one of the four "content" standards

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1 described in 11 C.F.R. § 109.21(c); and the communication satisfies at least one of the six
2 "conduct" standards described in 11 C.F.R. 109.21(d). 11 C.F.R. § 109.21(a).

3 The "content" standard includes: (1) an "electioneering communication" defined at
4 11 C.F.R. § 100.29(a) as a broadcast, cable, or satellite communication that refers to a clearly
5 identified federal candidate, is publicly distributed within a specific time frame, and is targeted to
6 the relevant electorate; (2) a "public communication" that disseminates campaign materials
7 prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of
8 a clearly identified federal candidate; and (4) a "public communication" that refers to a clearly
9 identified candidate, is distributed 120 days or fewer before an election and is directed to a
10 targeted audience. 11 C.F.R. § 109.21(c).²

11 Any one of six "conduct" standards will satisfy the third element of the three-part
12 coordination test. These standards are: (1) communications made at the request or suggestion of
13 the relevant candidate or committee; (2) communications made with the material involvement of
14 the relevant candidate or committee; (3) communications made after substantial discussion with
15 the relevant candidate or committee; (4) specific actions of a common vendor; (5) specific
16 actions of a former employee; and (6) specific actions relating to the dissemination of campaign
17 material. 11 C.F.R. § 109.21(d).

18

² In *Shays v. FEC*, ___ F.3d ___, 2005 WL 1653053 (D.C. Cir. July 15, 2005), the Appellate Court affirmed the District Court's invalidation of the fourth "public communication" content standard of the coordinated communications regulation. The District Court had remanded the matter back to the Commission, but in a ruling subsequent to the remand, the District Court explained that the "deficient rules technically remain 'on the books,'" pending promulgation of a new regulation. *Shays v. FEC*, 340 F. Supp. 2d 39, 41 (D.D.C. 2004). Thus, despite the Appellate Court ruling, the public communication standard is still in effect until a new standard is promulgated.

2. Alleged Coordination

The responses filed by CFG and Bluepoint primarily focus on denying that CFG coordinated *communications* with Franks. CFG Executive Director David Keating specifically denies in his affidavit that CFG paid for, aired or disseminated any communications in 2003 or 2004 "that mentioned, referenced, or featured the likeness of Trent Franks or his opponent." Keating Aff. ¶ 4. He further denies that CFG disseminated, distributed or republished campaign materials of Franks or his opponent. *Id.* at ¶ 5.

The affidavit of Bluepoint proprietor Christopher Baker lends some support to Keating's sworn statements. Baker, whose work for CFG since 2001 has included candidate and issue research, analysis of Congressional races and drafting of direct mail pieces, states that he never drafted any communications for CFG that referred to "Congressman Franks" or any communications that were disseminated in Arizona. Baker Aff. ¶ 11 and 12. To the extent that Baker, who received more than \$410,000 from CFG during the 2004 cycle may have drafted direct mail for CFG, his statement provides some corroboration to Keating's statements.

Finally, other available information, including a review of FEC disclosure reports, searches of newspaper and political advertising databases and relevant websites provided no indication that CFG financed any communication referring to Trent Franks during the 2004 election cycle.³

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FEC disclosure reports filed by other CFG entities provide no indication that Franks' campaign was among those races targeted by CFG in 2004. Of the more than \$1.7 million in contributions (mostly bundled) and independent expenditures CFG PAC, CFG's separate segregated fund, made in 2003-2004 to federal candidates, it gave a single \$1,000 contribution to the Committee on March 26, 2003. Another CFG-related entity, CFG.net, spent more than \$2.6 million to finance electioneering communications in the 2004 cycle, none of which reference federal candidates in Arizona.

1 Three of the four coordinated communication content standards require such a
2 communication to refer to a clearly-identified candidate. Keating's sworn statement, supported
3 by Baker's statement and other available information, indicates that CFG paid for no
4 communications that identified Franks in the 2004 election cycle. Keating also denies that CFG
5 disseminated a communication meeting the fourth content standard (dissemination of campaign
6 materials). Since there is no information that CFG paid for a communication that meets the
7 content standards, two of the three elements required for a communication to be considered
8 coordinated are not satisfied.

9 Even presuming that CFG paid for *any* communication concerning Franks' campaign, the
10 available information provides no support for an inquiry into whether the third element of the
11 coordinated communications regulation was satisfied -- the conduct standard. Christopher Baker
12 denies that he used or conveyed to CFG during the 2004 election cycle, any information about
13 the Franks campaign or any information that he had used previously in providing services to the
14 Franks campaign. *See* Baker Aff. ¶ 5-8. He also states he did not work for the Franks campaign
15 in 2004, a statement corroborated by the Committee's disclosure reports which show no
16 disbursements to Bluepoint or Baker after August 2003. *See* Baker Aff. ¶ 13. The fact that
17 Baker's work for the Committee appears to have ended in September 2003, more than a year
18 before the 2004 primary and general elections in Arizona, further reduces the likelihood that
19 Baker would have used any information learned during his association with Franks in any

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1 communication or other activity financed by CFG in 2004 since that information likely would
2 have been dated.⁴

3 Based on the foregoing, there is no basis to investigate whether CFG coordinated any
4 communications with Trent Franks or the Committee in 2004.

5 Finally, CFG and Bluepoint deny that CFG coordinated *any other type of expenditure*
6 with Franks and the Committee. See Responses of CFG at 4-5 and Bluepoint at 5. The Keating
7 and Baker affidavits provide some information supporting these general denials. When read
8 together, Keating and Baker state that Baker's work for CFG in 2003 and 2004 did not include
9 services "related to" Franks or the Committee.⁵ Similarly, when read together, their affidavits
10 deny that Baker was paid by CFG to work for or provide services to Franks, his Committee or
11 his opponent.⁶ Baker also states that he is unaware of *any activity* by CFG in 2003 or 2004
12 related to Franks and states that he was not the vendor used by CFG in the event they engaged in
13 any such activity. Baker Aff. ¶ 10. Keating does not specifically address whether CFG engaged
14 in other, non-expressive coordinated activities activity that related to Franks or his election.
15 Again, however, our review of the available information described above provided no indication
16 that CFG coordinated expenditures for any activity with Trent Franks.

17 In light of Respondents' specific denials to Complainant's general coordination
18 allegations, and in the absence of any other available information indicating that CFG or

⁴ Baker's statements relate only to the "common vendor" prong of the conduct standards, but in the absence of more specific allegations in the complaint, they constitute a sufficient rebuttal that he engaged in conduct that would satisfy the coordinated communications conduct standard.

⁵ Baker denies that he performed services for CFG that were related to Franks or his re-election campaign. Baker Aff., ¶ 3. Keating states more generally that Baker did no work for CFG related to Franks. Keating Aff. ¶ 6.

⁶ Keating denies that CFG paid Baker or Bluepoint to do work or provide services to Franks, his campaign or his opponent. Keating Aff. ¶ 6. Baker makes a similar statement that does not address Frank's opponent. Baker Aff. Par. ¶ 3 ("I have not been paid by the Club . . . to perform work for Congressman Franks.")

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Bluepoint coordinated communications or expenditures with Franks, we recommend that the Commission find no reason to believe that Club for Growth, Inc., the Committee to Re-elect Trent Franks for Congress and Lisa Teschler, in her official capacity as treasurer, Trent Franks and Bluepoint Consulting violated the Act or Commission regulations by coordinating expenditures as alleged in the complaint.

III. RECOMMENDATIONS

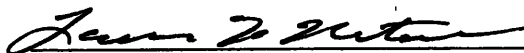
1. Find no reason to believe Club for Growth, Inc., the Committee to Re-elect Trent Franks for Congress and Lisa Teschler, in her official capacity as treasurer, Trent Franks and Bluepoint Consulting violated the Act or Commission regulations by coordinating expenditures as alleged in the complaint filed in this matter.

2. Approve the appropriate letters

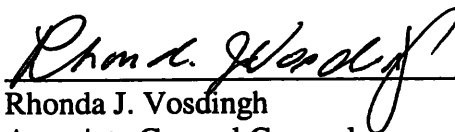
3. Close the file in this matter.

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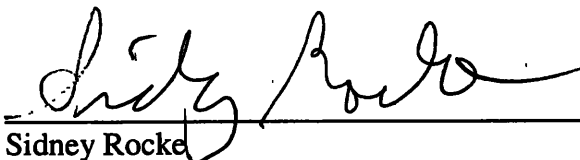
Date



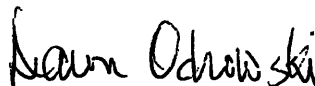
Lawrence H. Norton
General Counsel



Rhonda J. Vosdigh
Associate General Counsel



Sidney Rockefeller
Assistant General Counsel



Dawn Odrowski
Attorney

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